(7)

No. 95-8836

In The

Supreme Court of the United States

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

v.

TONY TURPIN, Warden, Georgia Diagnostic and Classification Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE RESPONDENT

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ARGUMENT

I. AS PETITIONER CONCEDES, THERE IS NO VIOLATION OF THE SUSPENSION CLAUSE IN HIS CASE.

Respondent acknowledges and welcomes Petitioner's concession under Question 3 as posed by this Court that the application of the new Act to Petitioner's case does not violate the Suspension Clause of the United States Constitution and cannot serve as the basis for granting any relief to Petitioner. Petitioner draws this conclusion "in view of the disposition by the court below." (Petitioner's brief at 7; 27-29). Respondent readily agrees with the statement made by Petitioner that the decision of the Circuit Court denying Petitioner leave to file his second habeas corpus petition is the "key to this conclusion." (Petitioner's brief at 28). Unlike Petitioner, however, Respondent asserts, as he did initially, that the Circuit Court correctly decided the "merits" of Petitioner's claims and correctly found the new Act's restrictions had no unconstitutional effect on Petitioner. *Felker v. Turpin*, No. 96-1077 (11th Cir. May 2, 1996). *Compare* Petitioner's brief at 29.

Petitioner acknowledges that the resolution made of Petitioner's case by the Circuit Court justifies no granting of relief to Petitioner on the Suspension Clause issue, and this conclusion stands independently of whether this Court determines that this case is an appropriate vehicle in which to discuss broader issues relating to the present scope of federal habeas corpus.

II. TITLE I OF THE ACT DOES NOT UNCONSTITUTIONALLY RESTRICT THIS COURT'S JURISDICTION, NOR DOES THE CONSTITUTIONALITY OF THE ACT DEPEND UPON THIS COURT'S EXPANSION OF DIRECT WRITS UNDER 28 U.S.C. § 2241.

In return for recognizing that Title I of the new Act does not impermissibly restrict this Court's jurisdiction, (Question 1), Petitioner seeks to exact a quid pro quo from this Court that this Court simultaneously agree to dramatically expand the scope of direct writs under 28 U.S.C. § 2241 (Question 2). Absent compliance with Petitioner's demand that this Court allow 28 U.S.C. § 2241 to be used to avoid following new congressionally mandated statutory procedures governing successive petitions, Petitioner explicitly states in his Summary of the Argument that he will assert the Act is unconstitutional. (Petitioner's brief at 7). Petitioner seeks to force upon this Court his view that the Constitution requires that petitioners be allowed to use 28 U.S.C. § 2241 to abuse the system by creating perpetual habeas corpus review. Such a convoluted reading of the Constitution, this statute, and this Court's precedent cannot be sustained.

Petitioner attempts to lend legitimacy to his strained constitutional interpretation by invoking the talismanic phrase, " 'there is no higher duty than to maintain [the writ of habeas corpus] unimpaired.' " *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U.S. 19, 26 (1939)). (Petitioner's brief at 12). The invocation by Petitioner of the traditions of habeas corpus does not cloak his "interpretation" with legitimacy. While Respondent agrees with the necessity of maintaining the

writ unimpaired, the views of Respondent and Petitioner diverge significantly on the meaning of "unimpaired."

As urged initially by Respondent, to maintain the writ of habeas corpus unimpaired is to maintain the integrity of the writ of habeas corpus, meaning the writ must be protected from abuse. Even Petitioner acknowledges that abuses of the writ of habeas corpus can be permissibly regulated by Congress. (Petitioner's brief at 22 n.20). Therefore, since the new Act is such a permissible regulation, its constitutionality on this basis is not in question.

Another faulty premise for Petitioner's argument is his invocation of the phrase "preexisting practice" to require not only that 28 U.S.C. § 2241 be unaffected by the new Act, but at the same time that 28 U.S.C. § 2241 be expanded. Petitioner attempts to use the "preexisting practice" of the Court as a basis for the expansion of direct writs. This ignores Petitioner's own admission that "[t]he Court's preexisting practice, described in Supreme Court Rule 20.4(a), has treated the entire subject of original habeas as exceptional and discretionary." (Petitioner's brief at 15). Petitioner conveniently omitted recognition of the portion of Rule 20.4(a) which states, "This writ is rarely granted." Petitioner also fails to note the requirement of the Rule that a petitioner show "that exceptional circumstances warrant the exercise of the Court's discretionary powers" in terming the writ as an "exceptional" one. Thus, the Rule, read as a whole, renders unconscionable Petitioner's attempt to expand direct writs and is in direct contravention of the "preexisting practice" of this Court.

This expansion of the availability of direct writs as urged by Petitioner is without historical or legal precedent. Nothing in the "preexisting practice" of this Court with respect to direct writs authorizes a conversion of this writ from "rare" to commonplace usage or allows all habeas corpus petitioners to seek direct review from this Court despite their failure to comply with other applicable statutory requirements. Such a conversion would authorize perpetual, rather than exceptional, review.

In addition, Petitioner illogically relies on the "plain meaning" rule of statutory construction to justify the expansion of 28 U.S.C. § 2241. Petitioner argues that because "plain meaning controls statutory construction," (Petitioner's brief at 10 n.7), the new Act does not, by its terms, affect the jurisdiction of this Court as contained in 28 U.S.C. § 2241. Petitioner ignores the logical conclusion which must be drawn from this assertion. If a "plain meaning" reading of the new Act is that 28 U.S.C. § 2241 direct writs are not affected, Petitioner cannot use "plain meaning" to expand the scope of direct writs beyond their traditionally limited and extraordinary scope.

While seeking to apply the plain meaning rule to the new Act, Petitioner contradictorily ignores this rule in connection with Supreme Court Rule 20.4(a) by seeking to redefine "exceptional circumstances" as contained in that rule. Under Petitioner's proposed definition, "exceptional circumstances" would include all unsuccessful ATF applicants and all capital habeas corpus petitioners. Nothing in this Court's jurisprudence compels such a reading of 28 U.S.C. § 2241.

While stressing one rule of statutory construction, i.e., the plain meaning rule, Petitioner neglects to cite another rule of statutory construction which is even more significant in the context of this case. As noted in the brief filed on behalf of the Solicitor General, this Court in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) stressed that "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (Solicitor General's brief at 30-31). *See also Vimar Seguro Y Reaseguros, S.A. v. M/V Sky Reefer*, ___ U.S. ___, 115 S.Ct. 2322, 2326 (1995) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974) and *Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Assn.*, 491 U.S. 490, 510 (1989)). Thus, as Respondent argued in his opening brief, plain meaning in this context may be read to allow peaceful coexistence between the new Act and the traditional scope of 28 U.S.C. § 2241.

Even though the gravamen of Petitioner's argument is to urge a more expansive interpretation of 28 U.S.C. § 2241, Petitioner alternatively relies on what he terms as this Court's "immemorial power to review plainly wrong refusals of habeas corpus relief on the basis of improper legal standards applied by lower federal courts." (Petitioner's brief at 10-11). The new Act does not interfere with any "immemorial power."

Petitioner's denomination of the ATF procedure set forth in § 106(b)(3)(A) of the Act as a "strict screening mechanism" (Petitioner's brief at 10) for successive petitions in the circuit courts is an implied concession that removal of the review of that decision does not derogate any "immemorial power." Respondent pointed out in his

initial brief that there historically did not exist any "immemorial power" concerning state prisoners, *see* Habeas Corpus Act of 1867; nor has this Court chosen to exercise any "immemorial power" regarding successive petitions; nor has this Court shown any tolerance for repeated abuses of the writ of habeas corpus. Thus, Respondent disputes Petitioner's assertion that the "immemorial power" of this Court is somehow abridged by the provisions of the new Act simply creating a "strict screening mechanism" for successive petitions.

Petitioner argues that there is a need for this Court to review the circuits courts' judgments on ATF applications in order to prevent the creation of "circuit supreme courts" and to prevent conflicts in the circuits. As asserted in the brief amici curiae of the Criminal Justice Legal Foundation and Citizens for Law and Order in support of Respondent, such an asserted "constitutional imperative for appellate jurisdiction" is without support in caselaw or history and is a matter for congressional consideration and resolution. (Brief of Amici Curiae for Respondent at 10). This Court can in future decisions interpret the standards set forth in the new statute and the manner in which an applicant can satisfy these standards (an analysis and interpretation unnecessary in this case under the circuit court's ruling) in cases in which an authorization to file has been granted and thereby, in reviewing those decisions, insure uniformity in the application of the successive petition requirements.

In the amici curiae brief of the American Civil Liberties Union and the ACLU of Georgia in support of Petitioner, amici make reference to what they call the "small core of successive petitions still permitted under the Act"

as needing review by this Court to assure "the supremacy of federal law and a uniform interpretation of the federal Constitution." (Amici Curiae Brief on behalf of the American Civil Liberties Union and the ACLU of Georgia at 7). It is the intention of Congress under the new Act, as it was the intention of this Court under such cases as *McCleskey v. Zant*, 499 U.S. 467 (1991), to severely limit the number of successive petitions to this "small core." However, Respondent takes issue with the assertion of those amici for Petitioner which alleges that the Court will effectively be denied jurisdiction to review these cases. This "small core" of successive petitions permitted under the Act will of course be reviewable by this Court because if such petitions are permitted to be filed under the Act, they will be filed in the district court and proceed to be reviewed on the appellate level in the same manner as under the old law. If review of the denial of ATF were available under the new Act, the only review would be whether there had been an abuse of discretion in not allowing the successive petition to be filed. The Court would not be reviewing to insure a "uniform interpretation of the federal Constitution." This argument therefore provides no support for the assertion that removal of the abuse of discretion review amounts to an improper restriction of the Court's jurisdiction.

In cases under the old law where this Court reviewed a lower court's decision to dismiss a petition as an abuse of the writ, the Court generally engaged in no sweeping constitutional pronouncements but rather determined whether, as a factual matter, a petitioner had met the new requirements to proceed as to the "merits" of the petition. In the past, the decisions of this Court in such instances

have been of little precedential value but, rather, have been brief statements as to whether the lower court abused its discretion in applying the appropriate standard at that time. A similar and limited review is all that this Court would be engaged in if it reviewed the denial of ATF applications. Respondent questions whether this Court should exercise its extraordinary jurisdiction under 28 U.S.C. § 2241 to review ATF applications for abuses of discretion in order to assure uniformity.

Petitioner argues that without review of decisions denying ATF, habeas corpus applicants such as those in *Schlup v. Delo*, ___ U.S. ___, 115 S.Ct. 851 (1995), and *Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514 (1992), would not have obtained relief under the new habeas corpus provisions. (Petitioner's brief at 22-27). This argument is unavailing as it is sheer speculation to assume that those petitioners would not have met the ATF criteria and thus been allowed to have their successive petitions reviewed in due course under the statute, including seeking review on a petition for certiorari in this Court.

In removing this Court's obligation to review this "strict screening" decision, this Court is not being removed, as Petitioner asserts, from reviewing important federal constitutional principles and insuring their uniformity in interpretation and application. As this Court has observed, very few new "bedrock" principles of constitutional law are now being propounded by this Court, and those which are can still be litigated under the present system. Moreover, as this Court specifically recognized in *Sawyer v. Smith*, 497 U.S. 227, 243 (1990) (quoting *Teague v. Lane*, 489 U.S. 288 (1989)), "it is 'unlikely that many such components of basic due process have yet to

emerge.' " The likelihood of such "bedrock" principles emerging in the course of reviewing denials of ATF is negligible.

As Petitioner acknowledges at page ten of his brief, under the ATF provisions of the new act, a respondent (in this case, the state warden where Petitioner is incarcerated) is not authorized to appeal a decision to allow a successive application to proceed. Despite the state's recognized interest in the finality of its judgments and in eliminating delay caused by collateral review, a respondent will be unable to evade the provisions of the act if there is disagreement with the circuit court's judgment. If a petitioner could circumvent the inability to appeal by filing a direct writ, a petitioner would be allowed a benefit not flowing to the respondent. Would Petitioner agree that an unsuccessful respondent would thereby also be able to utilize direct writs to seek review of a statutorily unreviewable decision of the circuit court?

There are numerous indications in both statutory provisions and this Court's rules that 28 U.S.C. § 2241 should not be utilized in lieu of filing an application for federal habeas corpus relief in the lower courts. For example, 28 U.S.C. § 2242 states that if an application for writ of habeas corpus is addressed to the Supreme Court or justice thereof, "it shall state the reasons for not making application to the district court of the district in which the applicant is held." This provision appears to serve as a warning that 28 U.S.C. § 2241 is not to be utilized to forum shop. This premise is supported by the provisions of Rule 20.4(a) of this Court which also requires that a petitioner filing under 28 U.S.C. § 2241 be required to show "that adequate relief cannot be obtained

in any other form or from any other court." This is also supported by Petitioner's recognition of the transfer authority incorporated within 28 U.S.C. § 2241 authorizing this Court to transfer direct writs to the appropriate lower federal court. (Petitioner's brief at 16 n.11). Such acknowledgement by Petitioner is at odds with Petitioner's assertion that the direct writ should be expanded, as the statutory provision already recognizes and generally applies the transfer authority so as not to function as an additional federal court and thus expand the forums in which successive petitions can be filed.

Respondent submits that, contrary to Petitioner's assertions, in order to make the requisite showing under 28 U.S.C. § 2241, it is not sufficient to show that resort to another court is futile, but a petitioner must in fact show that resort to another court is unavailable. The required showing is more than futility; it is unavailability.

In light of these current statutes and rules, the promotion by Petitioner of a system which permits the lower courts to be bypassed or ignored if they do not offer a "friendly forum," amounts to forum shopping and is reminiscent of the writ as it existed at common law allowing a petitioner to continually seek new forums until he was able to obtain release. *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 479-481 (1991) (quoting W. Church, *Writ of Habeas Corpus* § 386, p. 570 (2d ed. 1893) and *Salinger v. Loisel*, 265 U.S. 224, 230-231 (1923) (recognizing that the common law rule allowed endless renewed applications for the same relief to be made to "every other judge or court in the realm," but that this Court had since held that the availability of appellate review in the

criminal case required a material modification of this practice to permit disposal of successive petitions).

The extraordinary discretion of this Court should not be allowed to be used to denigrate this Court's paramount task of reviewing significant cases of far-reaching application. A writ which has been rarely used and even more rarely granted should not be allowed to be utilized to broaden the opportunity for successive petitioners to seek review of frivolous claims. The direct writ should not be interpreted to give a petitioner a greater opportunity to obtain collateral review, rather than narrowing the opportunity for obtaining successive collateral review as contemplated by the Act.

In summary, to allow the use of 28 U.S.C. § 2241 direct writs to review ATF denials would circumvent the statutory provisions set forth in the new Act as to successive petitions; unduly burden this Court by increasing this Court's duty over nonfundamental functions; add another commonly available layer of review to a system already providing multiple reviews; and expand beyond all present comprehension the scope and availability of 28 U.S.C. § 2241.

Petitioner's arguments fly in the face of the clear congressional intent underlying the new Act and threaten to undermine any statutory scheme for successive petitions adopted by Congress. If such a proposed expansion of 28 U.S.C. § 2241 is adopted by this Court, this will effectively absolve successive habeas corpus petitioners from the necessity of meeting the requirements of the new Act and allow the use of 28 U.S.C. § 2241 to review

unsuccessful attempts to meet the ATF provisions of the Act.

As to the remaining broader constitutional issues included in the Court's questions, Respondent has already stated his position that these questions present no case or controversy in the context of Petitioner's case and thus, recalendaring of these issues in this case is unwarranted. Any resolution which this Court wishes to make of these broader issues can more appropriately be resolved in future cases where the application of these constitutional principles presents a case or controversy.

CONCLUSION

By virtue of the Eleventh Circuit's disposition of Petitioner's ATF application below, and in light of Petitioner's failure to establish that the specific successive petition provisions of the new Act are unconstitutional on their face or as applied to Petitioner, Respondent submits that this petition for writ of certiorari should be dismissed as improvidently granted. Respondent opposes Petitioner's request that the stay of execution remain in effect until this Court is able to address Petitioner's questions, i.e., the standards which should govern original petitions and that the circuit court violated rather than applied the Act. Petitioner has established no basis upon which his questions are entitled to resolution and has demonstrated no basis for being granted an additional

stay of execution for the purpose of answering questions the resolution of which will not afford him relief.

Respectfully submitted,

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